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No. 73-646

In the Supreme Court of the United States

OCTOBER TERM, 1973

JOHN L. KROWCZYK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of 21 counts of having wilfully failed to collect, account for, and pay over to the United States employment taxes (income and social security) withheld from the wages of his employees, in violation of 26 U.S.C. 7215 and 7512(b). He was sentenced to imprisonment of one year concurrently on each count (Pet. App. 1a-2a).

1. As a result of his failure to pay over the taxes he had been withholding from his employees' paychecks, petitioner came under investigation in 1968 (Tr. 12).[1] At that time, he stated that he did not have the money to pay the taxes. On August 7, 1968, an Internal Revenue Service agent advised petitioner that he was required to make current deposits of the withheld taxes (Pet.

[1] "Tr." references are to the trial proceedings in the district court.

App. 3a). Three weeks later, a Treasury agent advised petitioner by certified mail of the consequences of failing to pay over the taxes (Tr. 15; Govt. Ex. 1).

After still having failed to comply, petitioner was again interviewed by the Internal Revenue Service agent on December 6, 1968, and given Form 2481 (Govt. Ex. 2), a Notice to Make Special Deposit of Taxes (Tr. 19). The notice directed him to collect income taxes and social security taxes withheld from employees, to establish a separate bank account in which petitioner, as trustee, was to deposit the withheld taxes no later than the end of the second banking day after the taxes were withheld, and to keep the taxes in the separate account until they were paid over to the Internal Revenue Service. The form contained a warning that criminal penalties could be invoked for noncompliance. The agent read the form to petitioner, explained it to him and advised him that he must also file special monthly returns and remit with each return the full amount of any taxes shown to be due (Tr. 24). Petitioner agreed to comply (Tr. 25) and signed the Form 2481 (Tr. 20).

In January 1969, the agent advised petitioner that he had not received the withholding form that petitioner was supposed to have sent him. When petitioner replied that he had not received any blank forms, the blanks were furnished to him. Although he agreed to complete and return them within two days, he again failed to do so. In March 1969, after having received no payments from petitioner, the agent referred the case to the Intelligence Division of the Internal Revenue Service (Tr. 25-26).

At trial, after presenting testimony in his own defense, petitioner admitted on cross-examination that he had understood that he was required to file special monthly reports, to open a special bank account, and to pay the

withheld taxes over to the government. He further admitted that he remained in business until October 31, 1969. but during that time did not open a special bank account nor make any payments of these taxes to the government (Tr. 142-144). As of the time of trial in July 1972, none of the taxes had been paid (Pet. App. 3a-4a).

2. Petitioner's contention (Pet. 5-7) that the evidence was insufficient to support the verdict is without merit. The government had to prove four elements. First, that petitioner was an employer who was required to collect and pay over withholding taxes. Second, that prior to October 1968, petitioner had failed to collect and pay over the taxes.[2] Third, that on December 6, 1968, he was notified of this failure by a hand-delivered notice which required him from that date forward to collect the taxes and deposit them promptly into a special bank account until they were paid over to the government. Fourth, that the petitioner thereafter failed to open the special bank account, deposit the taxes in it, and then pay them over to the government.

The first element was stipulated and the three remaining elements were established by the testimony of the government agents and petitioner himself. As the court of appeals observed, since petitioner "admitted that he failed to open the special bank account and deposit the funds as commanded by Section 7512, his guilt was established" (Pet. 8a). See *United States* v. *Patterson*, 465 F. 2d 360 (C.A. 9), certiorari denied, 409 U.S. 1038.

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[2]Petitioner urges (Pet. 5-6) that there was no evidence as to whether he collected the taxes. But the proof at trial demonstrated that petitioner collected the taxes in the required sense that he withheld them from his employees' paychecks (paying them their net wages after taxes) and that he did not account for and pay over the taxes.

3. Similarly, without merit are petitioner's arguments (Pet. 7-10) that the statutory scheme violated his right to due process and is tantamount to imprisoning him for debt. Petitioner was not deprived of due process of law merely because he was not accorded an administrative hearing prior to being placed in the trust-account category provided by Section 7512. Placing him in this category did not deprive him of any right. It merely insured his compliance with the withholding requirements to which every employer is subject. Due process does not "demand hearings during every stage of administrative proceedings which lead to a confrontation with the government. It is sufficient if a hearing is had prior to the final order which deprives the person of his liberty." *United States* v. *Patterson, supra,* 465 F. 2d at 361. See also *United States* v. *Plotkin,* 239 F. Supp. 129 (E.D. Wis.), where this contention was also rejected.[3]

Moreover, petitioner could have had a hearing with the appropriate officials of the Internal Revenue Service upon request at any time. Section 7512(c) provides that whenever the Secretary or his delegate is satisfied that all requirements of law and regulations with respect to the withheld taxes will henceforth be complied with, he may

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[3]In *Plotkin,* the court stated (p. 132):

> It should be noted that the procedure in this case is similar to that in other criminal prosecutions for failure to comply with a duty imposed by statute. If the person charged contends that he is not under the duty, a judicial review of the administrative determination that he is under the duty is not available until the trial of the criminal case when the issue may be raised as a defense.
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> * * *
>
> The statutes upon which this prosecution is based [Sections 7215 and 7512] do not deprive the defendant of due process of law.

immediately relieve the employer from the requirements of Section 7512(b), *i.e.*, he may cancel the Notice to Make Special Deposit of Taxes (Form 2481).

Contrary to petitioner's further argument (Pet. 8-10), he is not being imprisoned for failure to pay a debt. Under Section 7501(a), the funds in question did not belong to him but to the federal government. Petitioner's offense was therefore using the government's funds for his own personal purposes and not the failure to pay a debt due the government. Congress surely has power to classify such an offense as criminal conduct. See *United States* v. *Patterson, supra,* 465 F. 2d at 361.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.